83-1705

No. ___

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

JAMES W. PEKARSKI
individually and as president, Board of Commissioners,
Township of Bristol, et al.,
Petitioners

v.

ABRAHAM K. ABRAHAM,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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QUESTIONS PRESENTED

1. Whether a Plaintiff should be awarded counsel fees on an unrelated, distinguishable claim on which he does not prevail, where the claim on which he prevailed is not part of his cause of action until two years after the matter was initiated?

2. Whether the Federal Court may create a property interest claim where state law has not determined that a property interest obtains for purposes of 42 U.S.C. 1983; and whether the elimination of a position of employment for reasons of economy require a pre-termination hearing on economic issues and budgetary measures?

3. Is the elimination of a supervisory position for reasons of economy a legislative function for which absolute immunity should attach?

4. May punitive damages be assessed against township commissioners for the act of voting on a measure without a showing of malice towards the Plaintiff?

Parties: The Township of Bristol and Bristol Township Commissioners James W. Pekarski, L. Marie Mascia, Chaser J. Cotugno, William H. Sommerer, Anthony V. Gesualdi, Robert Lewis, Jr., Jennie Cattani, Jerry Catania, Albert M. Wurm, and Anthony J. Melio.

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No. _____

JAMES W. PEKARSKI, individually and as president of the Board of Commissioners, Township of Bristol, et al.,

Petitioner

v.

ABRAHAM K. ABRAHAM,

Respondent

PETITION FOR A WRIT OF CERTIORARI

The Township of Bristol and its Commissioners, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the District Court of summary judgment motion (App. infra A-1 to A-22) is reported at 537 F. Supp. 858 (E.D. Pa. 1982). There were no other opinions filed in the District Court. The opinion of the Third Circuit Court of Appeals (App. infra A-26 to A-42) has not been reported as yet.

JURISDICTION

The judgment of the Court of Appeals was entered on February 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED

1. The Bristol Township Manager's ordinance provides that no employee shall be discharged except for just cause and reads in pertinent part as follows at Chapter I, Section 26(n):

> "(n) He shall hire, and when necessary for the good of the service, shall suspend or discharge all employees under his supervision, provided that persons covered by the Civil Service provisions of the Township Code shall be hired, suspended, or discharged in accordance with such provisions; provided further, that the Manager shall report, at the next meeting thereafter of the Board of Commissioners, any action taken by authority of this sub-section. No person shall be discharged without just cause."

2. The Respondent contends that his property right under the ordinance was taken away without due process of law under the Fourteenth Amendment and thus created a cause of action under 42 U.S.C. 1983 and was entitled to counsel fees under 42 U.S.C. 1988. The relevant portions thereof are as follows:

> "Section 1983. Civil action for deprivation of rights
>
> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

"Section 1988.

". . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The 14th Amendment to the U.S. Constitution provides in relevant part:

"U.S. Constitution Amendment 14th Section 1:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

1. The Respondent was employed as the Director of the Department of Roads and Public Property. At the time of his hire he was advised that his engineering background was a significant factor in the Township's decision to hire him as this would help cut the rising cost of outside engineering. However, after Respondent's hire, costs were not being cut and outside consultants were being used just as frequently. Other costs were also rising sharply and the Township eliminated Respondent's position to help balance the budget. Respondent successfully argued that the elimination of the position was a mere subterfuge to fire him because he would not follow orders to pave streets and perform other municipal services which he believed were being allocated on a political basis rather than on a basis of need as perceived by him.

2. While it may be factually established that a particular economic decision was influenced by other factors, the Court of Appeals decision may create an untenable situation where other budgetary decisions including lay offs would give rise to a cause of action. The statutes and case law of the Commonwealth of Pennsylvania do not support that position. Initially the Respondent claimed that his right to freedom of association was being infringed upon and that his dismissal was based only upon his political affiliation. At a much later time the Respondent added a claim that he was denied due process because he had not been granted a hearing prior to his discharge. That is the claim upon which he prevailed.

The Respondent was awarded all costs and counsel fees for all services provided on the claim in spite of the uncontroverted fact that from the initiation of this matter by initial interview to the filing of the original complaint on October 1, 1979 to the amendment of the complaint on March 16, 1981 adding the due process claim;

over two years had elapsed and a considerable portion of counsel's services expended.

Finally, punitive damages were assessed despite the uncontroverted fact and there was no assertion to the contrary that no personal malice was directed at the Respondent by any of the Defendants. As to several of the Township Commissioners, the only evidence introduced was the tally of the vote indicating that they voted for the measure.

3. This action was brought in the U.S. District Court for the Eastern District of Pennsylvania where the Federal questions of associational First Amendment claims and 14th Amendment due process claims were raised.

REASONS FOR GRANTING THE PETITION

Counsel Fees — 42 U.S.C. 1988

On the issue of counsel fees to a prevailing Plaintiff under 42 U.S.C. 1988 this Court has directed the lower Courts that where a Plaintiff brings a multi-count action and the Plaintiff prevails on some but not all of his claims that he is entitled to an award of fees only on the claims on which he prevailed. See *Hensley v. Eckerhart*, 103 S. Ct. 1933 (1983). This decision was brought to the attention of the Court below but the Court below merely stated that the work product of counsel on the claim on which he did not prevail was "useful" in obtaining the result in the claim on which he did prevail. Consequently, all time would be applied.

A statement of that nature can be made in almost every case unless more clearly defined standards are set. In the instant case, the work product involved was expended long before the claim on which Respondent eventually prevailed was even asserted in the action. Almost two and one-half years elapsed after counsel began

providing services for the Respondent on this matter before the due process claim was asserted. The Respondent had different counsel in the earlier stages of the litigation and it was only at or near the end of the two and one-half year period that new counsel took over the litigation and decided to add the due process claim. The original claims and the later claim were clearly based on different facts and legal theories and are clearly on point with *Hensley v. Eckerhart, supra*; where this Court held that where the plaintiff failed to prevail on a claim that is distinct in all respects from the successful claim, the hours spent on that claim should be excluded. Abraham's original claim that his choice and prioritizing of public works were in some manner an expression of his freedom of speech and freedom of association were the real substance of his lawsuit. The issue of the Board of Commissioner's failure to provide him with a hearing based upon his "just cause" property right was an entirely distinct, separate and subsidiary claim, totally unrelated to the First Amendment claim.

Rarely will the Court be confronted with a more distinct claim where even counsel is changed at the watershed point.

Where the State Courts have not determined whether a just cause provision creates a property right, can a Section 1983 claim be asserted?

Your Petitioners requested that the Court dismiss the Respondent's claim due to the lack of a property right in employment where the position is eliminated for budgetary reasons. The District Court, in denying the request for summary judgment necessarily concluded that the just cause provision in the Township Manager's ordinance created a property right in spite of the lack of legal support from the highest level of the State Courts. The Court held that a termination for reasons of economy was an adjudication if the employee had a reasonable expectation of continued employment.

In so stating, the District Court held at page 868 of *Abraham v. Pekarski, et al*, 537 F. Supp. 858 (1982) that:

> "Even though neither the Pennsylvania Supreme or Superior Courts have directly ruled or whether employment protected by a 'just cause' provision gives rise to a property right under the Local Agency Law, the numerous interpretations of that Act by the Commonwealth Court provides very strong support for finding such a right and fail to indicate that such a property right would not be found to exist."

A decision of this nature could conceivably subject a public or private employer to liability for lay-offs, reduction in hours, or other cut-backs if a claim is made that the economy measures are subterfuges for some other end. Decisions of that nature must be left to the States to determine property right questions where far-reaching effects may flow from the establishment of state law through a Federal Court decision in such a matter.

In deciding that a property right was established, the Court relied on *Sergi v. School District of Pittsburgh*, 28 Pa. Comm. 576, 368 A.2d 1359 (1977), where somewhat contradictory language was used to state that a dismissal based upon reasons of economy is not an adjudication because there is no reasonable expectation of continued employment. The reasonable expectation of continued employment would have to be based on a specific *statutory guarantee of a right to work in spite of and even in the face of economic cut-backs*. The Court in *Sergi, supra*, said no such guarantee existed and without such a guarantee, the employee had no right to continued employment in light of economic cutbacks. The language of the case is entirely in keeping with the law of the Commonwealth of Pennsylvania but the Commonwealth Court's manner of expression caused great

confusion and caused the federal court to totally misinterpret the law of the Commonwealth of Pennsylvania. The language of *Sergi, supra*, from page 1361 is as follows:

> "We are persuaded, therefore, that the termination of the appellant's employment for economy reasons was an adjudication within the purview of the Local Agency Law *only* if he had an enforceable expectation of continued employment which has been guaranteed either by contract or by statute, and we find no such enforceable expectation.
>
> "This Court held on numerous occasions that the provisions of the Local Agency Law apply to the dismissals, terminations, or suspensions of public employees whose right to continued employment is based on a statutory guarantee. Here, however, the appellant was a nonprofessional employee, and the Public School Code of 1919 (Code) provides such employees with only limited statutory protection from dismissal under Section 514, 24 P.S. Section 5-514, i.e., a board of school directors must give adequate notice and the opportunity for a hearing to any nonprofessional employee before terminating that employee's services for reasons of incompetency, intemperance, neglect of duty, violation of Commonwealth school laws or other improper conduct. It does not offer protection against termination for reasons of economy." (Emphasis supplied.)

If in fact the Bristol Township Manager's ordinance states that even in the face of economic cut backs that employees had a reasonable expectation of continued employment then a property right not to be discharged or laid off would obtain and then a hearing would be necessary. Therein lies the problem inherent in the lower Court's decision that could have far-reaching and devas-

tating effects of prohibiting lay-offs without a hearing or an elimination of positions without a hearing.

That is not to mention the fact that township commissioners who vote for a cut-back in employment could be held personally liable for punitive damages based merely on their vote.

As Chief Justice Burger stated in *Morrisey v Brewer*, 92 S. Ct. 2593, 408 U.S. 471, 33 L.Ed.2d 484 (1972) at Supreme Court Reporter 2600:

> "The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."

The holding of the Court in this matter, however, was that where there is a just cause provision that the jury should decide whether there was an economic necessity or whether there was subterfuge. This, again, conflicts with Pennsylvania law that holds very clearly that the municipality's choice of means of saving revenue is solely within the discretion of the municipality. In *Fusaro v. Civil Service Commission of the City of Pittsburgh*, 16 Pa. Com. 1, 328 A.2d 916 (1974), Judge Wilkinson states as follows at page 918 of the Atlantic Reporter:

> "There is no merit to the construction of the Act espoused by appellant that once a city has determined a position to be economically unfeasible, it then must re-evaluate the economic feasibility of all the positions held by employees eligible for retirement or hired after the holder of the position to be terminated to see if economy could be effectuated by termination of any of those positions. Such a requirement would fiscally handcuff any city. It is absurd to believe that the legislature would intend such a result.

"To adopt appellant's position would prevent a city from terminating an economically unfeasible position. When faced with an economic cutback, the city would be required to retain unneeded employees and discharge potentially essential ones who may be eligible for retirement or who are recently employed. The city's discretion of whom to retain and whom to fire would be severely curtailed. Such a situation is contrary to law, for the Supreme Court has held that the determination that a position should be abolished for reasons of efficiency and economy is *solely* within the judgment and discretion of the governing authority in whom the power to eliminate the office is vested."

"The Pennsylvania Courts have often held that a municipality may eliminate civil service positions for reasons of economy and without hearings. Were it otherwise, civil service employees and other public employees could virtually handcuff a public employer facing economic distress. *Gaul v. Philadelphia*, 384 Pa. 494, 121 A.2d 103 (1956); *Essinger v. City of New Castle*, 275 Pa. 408, 119 A. 479 (1922). The Third Circuit Court of Appeals relies on *Perri v. Aytch*, 724 F.2d 362 (1983), holding that where a final determination is made that affects a property right, a pre-deprivation hearing is required. In so holding, the Court states as follows at page 366:

"Even though Perri had a property interest in her probationary employment, she still must demonstrate that she was deprived of the interest without due process of law. A plaintiff claiming a due process violation 'while relying upon state law to establish his property right, looks to federal law to define procedural due process.' *Pederson v. South Williamsport Area School District*, 677 F.2d 312, 316 (3d Cir.), cert. denied, 103 S. Ct. 305 (1982). The Supreme Court has found that the procedural requirements vary with the nature of the case and

> that competing policy interests must be balanced to determine what process is due. See *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Although the Court has stressed a flexible approach to the assessment of the requisite procedures, '[t]he Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests.' *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974). In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the Court stressed that 'the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. Thus it has become a truism that 'some form of hearing' is required before the owner is finally deprived of a protected property interest.' *Id.* at 433."

Consequently, the inescapable conclusion of the Court's Order in the instant case, is that a hearing must precede all lay-offs and all other economically mandated job actions. The impact of this holding could be staggering.

Is the elimination of a position of employment a legislative function to which absolute immunity should attach?

While there were other issues addressed by the Court in determining the legislative immunity question, not the least among which was the Court's review that the issue was not preserved, the major question of whether the elimination of a position is a managerial as opposed to a legislative function was decided in favor of a managerial function. This again leaves public officials virtually without protection in preparing a budget that eliminates positions of employment.

May punitive damages be assessed based upon a legislative or a managerial vote?

There was no assertion in this case that any of the Defendants bore any malice or personal animosity to-

wards Abraham. It was shown that the commissioners were aligned in factions that voted for their own faction on various issues including allocation of services. A requisite for punitive damages is a "malicious intention to cause a deprivation of Constitutional rights or other injury" to the Plaintiff. *Wood v. Strickland*, 420 U.S. 308, 43 L.Ed.2d 214; 95 S. Ct. 992 (1975).

Punitive damages are not favored in the law and should be allowed only with caution and within narrow limits. *Lee v. Southern Home Site Corp.*, 429 F.2d 290 (5th Cir. 1970). As to some of the Defendant Commissioners, the only evidence adduced against them was their vote for the resolution which resulted in Abraham's loss of employment. A decision of this nature can have a chilling effect on legislative functions at the level of government closest to the people and where the greatest flexibility is required. The Township Commissioners in question earn $3,000.00 per year from positions as elected Township officials. There was a total of $10,000.00 in punitive damages awarded or $2,000.00 for each of the five Commissioners who voted for the measure. This decision could cause other legislators to refrain from acting when necessary and restrict the ability of local government to function. As this Court observed in *Scheuer v. Rhodes*, 94 S. Ct. 1683, 416 U.S. 232 (1974) at page 1689:

> "Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. A concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error then not to decide or act at all. See also *Barr v.*

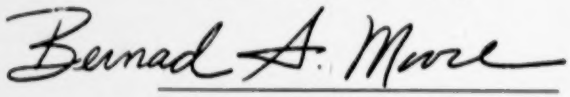
Matteo, 360 U.S. 564, 79 S. Ct. 1335 (1959); *Spalding v. Viles*, 161 U.S. 483, 16 S. Ct. 631 (1896). See also *Pierson v. Ray*, 387 U.S. 547 (1967).

The effects of this decision can be far-reaching and have very destructive and dangerous potential.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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CERTIFICATION

I hereby certify that copies of the Petition for Writ of Certiorari have been served to each of the following by certified first class mail on this 12th day of April, 1984:

Alexander L. Stevas, Clerk
U.S. Supreme Court
1 First Street, N.E.
Washington, D.C. 20543
(40 copies)

Marshall E. Kresman
WALDER, MARTIN & KRESMAN
1953 Street Road
Bensalem, PA 19020
(3 copies)

BERNARD A. MOORE

APPENDIX

APPENDIX A

OPINION AND ORDER
(Dated April 21, 1982)

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

ABRAHAM K. ABRAHAM	:	CIVIL ACTION
	:	
v.	:	
	:	
JAMES W. PEKARSKI, et al.	:	NO. 79-3912

OPINION AND ORDER

EDWARD R. BECKER* APRIL 21, 1982

I. *PRELIMINARY STATEMENT*

This civil rights action was brought by the former Director of Roads and Public Property of Bristol Township, Bucks County, Pennsylvania, against the Township and the members of its Board of Commissioners, seeking to redress his discharge which had been prompted by plaintiff's refusal to deny the services of his department to wards served by Commissioners unallied with the Board's dominant political faction. This opinion addresses defendants' motion for summary judgment which has raised two important questions. The first question is whether the doctrines of *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), protect the First Amendment associational rights of a nonpartisan and politically unaffiliated employee whose employment is terminated for disobeying orders that he deems "political" and contrary to the public interest. As will be seen, we answer that question in

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* Of the Third Circuit Court of Appeals, sitting by designation. At the time the motion adjudged herein was filed, Judge Becker sat as a Judge of the United States District Court of the Eastern District of Pennsylvania.

the negative. The second question is whether a governing Township ordinance providing that "no person shall be discharged without just cause," when read in conjunction with sections of the Pennsylvania Local Agency Law, providing that no action "affecting . . . property rights" shall be valid unless the affected party has notice and a hearing, gives plaintiff a property right in his public employment protected by the Fourteenth Amendment's due process clause. As will be seen, at this stage of the litigation, we answer that question affirmatively.

Rule 56 of the Federal Rules of Civil Procedure permits a grant of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The burden of demonstrating the absence of any genuine issue of material fact rests on the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The inferences to be drawn from the underlying facts advanced by the movant must be viewed in the light most favorable to the nonmovant, *United States v. Diebold*, 369 U.S. 654, 655 (1962). Defendants, however, have not accompanied their motion with any affidavits or other materials which may be considered in adjudging a summary judgment motion.[1] Therefore, for

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1. A court may not consider on a summary judgment motion documents that have not been identified by affidavit or otherwise made admissible in evidence. *See generally* 6 Moore's Federal Practice ¶ 56.11 [1.-8] (1981). Defendants' only submission in support of their motion is an unauthenticated copy of the minutes of a July 25, 1979, Special Meeting of the Board of Commissioners of Bristol Township. We have read these minutes and have concluded that the result herein would not have been different had the minutes been properly authenticated. *See* n.16 *infra*.

Despite the lack of any materials accompanying the motion, pursuant to F.R.Civ.P. 56(c), we have considered the depositions on file in examining the propriety of summary judgment.

purposes of ruling on the motion, we will treat all of plaintiff's well-pleaded allegations as true. *See Sheridan v. Garrison*, 415 F.2d 699, 709 (5th Cir. 1969). *cert. den.*, 396 U.S. 1040 (1970); 6 *Moore's Federal Practice* ¶56.11 [2], at 56-210 (1981).[2] After reciting the facts upon which we base our decision, we will outline the issues raised by defendants' motion. We will then explain our conclusion that defendants' motion must be granted insofar as it relates to plaintiff's *Elrod/Branti* claim and denied insofar as it relates to plaintiff's due process claim.

II. *THE FACTUAL BACKGROUND AND THE CONTENTIONS OF THE PARTIES*

Plaintiff, who is of Southern Asian extraction, was employed by Bristol Township, Bucks County, Pennsylvania, as Superintendent of Roads and Public Property from March 19, 1976, until January, 1977, and thereafter as Director of Roads and Public Property until July 25, 1979, when his employment was terminated. Although he was vested with some discretion in the execution of his duties, such as determining which potholes should be filled, plaintiff's position did not empower him to make policy decisions. Rather, he was required to execute directives and implement Township policies as determined by the Bristol Township Board of Commissioners. During his tenure, plaintiff performed his responsibilities with efficiency and diligence.[3]

On July 25, 1979, plaintiff's position as Director of Roads and Public Property was eliminated by the Board

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2. Furthermore, at oral argument, defendants' counsel conceded that plaintiff's statement on the facts should be accepted for purposes of ruling on the summary judgment motion.

3. Defendant Pekarski complained about Abraham's performance, but he admitted that the quality of Abraham's performance was unrelated to the loss of his job. Deposition of James W. Pekarski, August 14, 1980, at 13-15, 27.

and his duties were assumed by a department assistant at an increased salary.[4] Plaintiff alleges that his position was terminated because he refused to cooperate with Commissioners Pekarski and Gesualdi and their political faction and accommodate their wishes by denying services to those wards in Bristol Township represented by

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4. This transaction is revealed in the following excerpts from the transcript of the Commissioners' meeting:

CATANIA — At this time I'm making a motion to eliminate the highway director's job and to move the assistant to take over the control of that department.

PEKARSKI — Motion by Commissioner Catania to eliminate the director's job of the Highway to be taken over by Bill Surrick made by Jerry Catania. Is there a second?

GESUALDI — Second.

LEWIS — On the question?

PEKARSKI — On the question, Commissioner Lewis.

LEWIS — On the question, I think that a motion of this nature is highly improper at this particular moment.

GESUALDI — We don't care what you think. Let's vote.

LEWIS — I think that a statement of that nature smacks of arrogance of power, and, I think that you'll have to answer to quite a few people if you intend to ride a motion through like that.

PEKARSKI — Do you have a question?

COTUGNO — One question, Mr. Chairman. I think really this oughta—of this importance we oughta discuss it and it be brought up at the next regular public meeting.

PEKARSKI — Any other questions?

MASCIA — Commissioner Cotugno, did I spend a week down at Public Highway in February? Did I come back and get the whole Board the report? Alright.

LEWIS — Do you—Are there any other people you also have in mind for the vacancy at this time?

PEKARSKI — Not filling the vacancy.

MASCIA — Bob, when I spent 40 and 60 hours—budgetary reasons.

PEKARSKI — That was just part of this motion that they were moving Bill Struck in there.

LEWIS — I make a motion that we table it.

PEKARSKI — Poll the Board. [Motion passes, five votes to three votes.]

Commissioners with whom they were not allied.[5] Defendants, in their answer to the complaint, admitted that plaintiff was dismissed, but deny plaintiff's averment as to the cause for his dismissal. Plaintiff's duties as Director continue to be executed by his assistant, who serves as "Acting Superintendent" of the department.

Shortly thereafter, plaintiff filed this suit in which he asserts a number of claims and seeks damages and reinstatement. First, as we have previously suggested,

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Transcript, Special Meeting Board of Commissioners of Township, July 25, 1979, at 10-11.

LEWIS — I'd like to just ask one question regarding the elimination of the job in the highway department. Did we eliminate the job and then promote somebody into the job? What—

MASCIA — We said—eliminate the job.

PEKARSKI — . . . Bill Struck will take over as the head of the department.

LEWIS — In other words, you now have a new head of the department. You've eliminated the job or you created a new head of the department?

PEKARSKI — That's what was said. Commissioner Lewis, if you'd keep your ears open, you'd hear.

LEWIS — I heard it. And, the next question I have because I've kept my ears open, is what salary do you intend to pay—

PEKARSKI — Same salary, because we raised it before to do the job and he's the guy who's been doing the job down there.

GESUALDI — Commissioner Lewis, you belong in the Vets Stadium in the grandstand.

Id. 13-14.

LEWIS — Did we eliminate the job at the highway department or lay him off?

PEKARSKI — We eliminated the job at the Highway Department.

GESUALDI — Would you like to elaborate on that, Mr. Lewis?

LEWIS — Unintelligible.

Id. 24-25.

5. His allegation finds support in the deposition of defendant Chaser Cotugno, July 9, 1980, at 15.

plaintiff contends that the termination of his employment violated his First Amendment freedom of association by punishing him for his refusal to join the political faction of Commissioners Pekarski and Gesualdi. Second, he asserts that his dismissal was in violation of the procedures of Bristol Township and the Commonwealth of Pennsylvania, thereby constituting a violation of his procedural due process rights. Third, he claims that defendants acted in concert to deprive him of his constitutional rights in violation of 42 U.S.C. §§ 1985 and 1986. Fourth, he claims that defendants intentionally inflicted emotional distress upon him.

In their summary judgment motion defendants argue that plaintiff was not "dismissed," but rather that his position was "eliminated" by the Board of Commissioners; that these facts do not present a cognizable *Elrod/Branti* claim; that plaintiff possessed no property interest in his employment sufficient to invoke the due process clause (or that there was no "adjudication" to which due process hearing requirements could attach); and that plaintiff's §§ 1985 and 1986 claims are factually and legally untenable. We have held an extensive hearing and received several briefs in connection with the motion. We need not engage in any extensive discussion of the §§ 1985 and 1986 claims as plaintiff has simply adduced no evidence of the presence of any of the elements of § 1985 (2) or (3), the only conceivable sections of the statute on which plaintiff's claim could rest, and summary judgment for defendants will be granted thereon.[6] We must however consider *Elrod/Branti* and

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6. Plaintiff has not specified under which specific provision of § 1985 his claim lies. His claim could conceivably fall only under § 1985(2) or under § 1985(3). Plaintiff's claim fails under these provisions because he has failed to produce any shred of evidence that there existed a class-based invidiously discriminatory animus behind defendants' alleged conspiratorial action. *See* Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (stating requirements of § 1985(3)); Brawer v. Horowitz, 535 F.2d 830, 839-40 (3d. Cir. 1976) (stating requirements of § 1985(2)). Plaintiff attempts to show this animus exclusively through the deposition testimony of Commis-

the due process claims in some detail and we will do so in that order. As a predicate to that discussion, we will assume that there is a genuine issue of fact on the question whether plaintiff lost his position as the result of a neutral budgetary decision or as the result of retaliation for his refusal to accede to the wishes of the dominant faction on the Board[7]

III. *THE ELROD/BRANTI FREEDOM OF ASSOCIATION CLAIM*

Few Supreme Court decisions in recent years have generated as much litigation and controversy as have *Elrod* and *Branti*.[8] Moreover, because of the lack of a majority opinion in *Elrod*, a problem not cured by

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sioner Chaser Cotugno, that on one occasion while discussing plaintiff, Commissioner Gesualdi stated, "I will get him an elephant" Cotugno opined that by this remark Gesualdi was "downing the man's nationality." This evidence is simply insufficient to sustain the requirements of § 1985(2) and (3). Furthermore, plaintiff has produced no "significant probative evidence" in support of his conspiracy claim. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F.Supp. 1100, 1139-43 (E.D.Pa. 1981), *appeal pending*, No. 81-2331 (3d Cir.). Plaintiff's § 1986 claim fails because it is merely derivative of the § 1985 claim. Rogin v. Bensalem Twp., 616 F.2d 680, 696 (3d. Cir. 1980), *cert. denied sub nom.*, Mark Garner Assocs., Inc. v. Bensalem Twp., 450 U.S. 1029 (1981).

We do not undertake upon our own motion to dispose of the pendent tort claim. We do note, however, that, in all likelihood, plaintiff's claim for intentional infliction of emotional distress is frivolous. *See*, Cautilli v. GAF Corp., 531 F.Supp. 71 (E.D.Pa. 1982).

7. *See* n.5, *supra*, and accompanying text and n.21, *infra*.

8. In *Elrod*, the Court ruled that a state government employees' First Amendment rights were violated by his removal from his post for partisan political reasons if his employment did not involve confidential or policy-making duties. This ruling was further refined in *Branti* to effect that even a confidential policy-maker's First Amendment rights would be violated by a discharge for partisan political reasons unless his policy-making role included matters legitimately affected by partisan political considerations. The kernel of these rulings, as we explain in the test of this opinion, was that government may not make the exercise of First Amendment rights a condition to public employment.

Branti, the sweep of *Elrod* and *Branti* has been subject to a good deal of critical analysis seeking to assess their reach.[9] We need not, however, continue the dialogue. For the purpose of analyzing plaintiff's claim we may with confidence posit that *Elrod* and *Branti* at least stand for the principle that the denial of a public benefit, such as public employment, "may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly," *Elrod*, 427 U.S. at 361,[10] and that the *Elrod/Branti* doctrine does not proscribe all patronage hirings but only those that threaten to penalize a public employee's exercise of his First Amendment rights. If the government could have commanded a particular result directly, then making that result a condition of receipt of a public benefit will not violate the Constitution.[11]

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9. The wisdom of *Elrod* and *Branti* has also been subjected to critical judicial comment. *See, e.g.*, Loughney v. Hickey, 635 F.2d 1063, 1065-71 (3d Cir. 1980) (Aldisert, J., concurring); Farkas v. Thornburgh, 493 F. Supp. 1168, 1169-71 (E.D.Pa.) (Troutman, J.), *aff'd mem.*, 623 F.2d 209 (3d Cir. 1980), *aff'd. mem. sub nom.*, Appeal of Farkas, 642 F.2d 441 (3d Cir. 1981).

10. This proposition was the essence of the agreement between the majority concurring opinions in *Elrod* which garnered the necessary votes to affirm the lower court judgment in the discharged employee's favor and was not affected by the subsequent refinement in *Branti*. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . ." Marks v. United States, 430 U.S. 188, 193 (1977) (*quoting* Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

Regarding reconciliation of the plurality and concurring opinions in *Elrod* see Alfaro DeQuevedo v. DeJesus Schuck, 556 F.2d 591, 592 (1st Cir. 1977); Rosenthal v. Rizzo, 555 F.2d 390, 396 (3d Cir.) (Aldissert, J., dissenting), *cert. den.*, 434 U.S. 892 (1977); Caterson v. Caso, 472 F.Supp. 833, 836 (E.D.N.Y. 1979).

11. *Accord* DeLong v. United States, 621 F.2d 618, 623 (4th Cir. 1980); Rosenthal v. Rizzo, 555 F.2d at 392; Mazus v. Department of Transp., 489 F.Supp. 376, 389 (M.D.Pa. 1979), *aff'd*, 629 F.2d 870 (3d Cir. 1980), *cert. den.*, 449 U.S. 1126 (1981).

The *Elrod/Branti* doctrine is further limited to firings "solely" for political purposes.[12] Thus, Justice Brennan, writing for the plurality in *Elrod*, emphasized that "employees may always be discharged for good cause, such as insubordination or poor job performance, when those bases in fact exist." 427 U.S. at 367.[13] Against this background we shall now proceed to evaluate plaintiff's claim.

Plaintiff's case differs significantly from *Elrod* and *Branti* in that he does not claim to have been discharged from employment because he was not affiliated with the political party in power. Certainly protection from

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12. The question in *Elrod* was "whether public employees who allege that they were discharged or threatened with discharge *solely* because of their partisan political affiliation or nonaffiliation have a constitutional claim." 427 U.S. at 350. (Emphasis supplied). *See also* 427 U.S. at 376 (Stewart, J., concurring). *Branti* presented the Court with the question whether the constitution protects "an assistant public defendant who is satisfactorily performing his job from discharge solely because of his political beliefs." 445 U.S. at 508. (Emphasis supplied). *See generally* McMullan v. Thornburgh, 508 F. Supp. 1044 (E.D.Pa., 1981); Farkas v. Thornburgh, *supra*.

13. A discharged public employee who alleges that he was discharged solely for poitical purposes must produce the prof of causation required by Mt. Healthy Board of Education v. Doyle, 429 U.S. 274, 287 (1977) (footnote omitted):

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' — or to put it in other words, that it was a 'motivating factor' in the Boards decision not to rehire. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

In a scholarly opinion, Farkas v. Thornburgh, *supra*, Judge Troutman has interpreted the "solely for political purposes" prerequisite in light of *Mt. Healthy* as implying that "an independent justification coupled with a constitutionally flawed reason will not taint [a public official's] decision to terminate plaintiff's employment." 493 F. Supp. at 1174.

unconstitional conditions to the receipt of government benefits is not reserved for political party members. But the absence of any allegation that plaintiff has been penalized because of his party affiliation or nonaffiliation makes identification of the afflicated First Amendment interest more difficult and remote.

Plaintiff contends that the termination of his employment by the Board of Commissioners amounted to a political firing prohibited by the *Elrod/Branti* doctrine because it was motivated by his refusal to execute the partisan instructions of individual Commissioners to deprive wards represented by unallied Commissioners of public services. Plaintiff maintains that in refusing to execute these politically motivated directives he was refusing to ally himself with the majority faction on the Board and maintains that the Board's actions amounted to an infringement of his First Amendment freedom of association.[14]

Beyond pointing out that plaintiff had the discretion to determine the order in which potholes would be filled[15] and that he made suggestions regarding his department's budget,[16] defendants do not claim that plaintiff had a policy-making role which included matters legitimately affected by partisan political considerations. Indeed, little persuasive force attends a contention that duties such as the filling of potholes and streetpaving require a certain political affiliation in order to be effectively performed. *See Loughney v. Hickey*, C.A.No. 78-302 (M.D.Pa. Jan. 29, 1981). We, therefore, must consider the applicability of the *Elrod/Branti* doctrine to the termination of a position of public employ-

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14. Plaintiff has not asserted any infringement of his freedom of belief and, at oral argument, plaintiff's counsel expressly declined the opportunity to advance such a theory.

15. Deposition of James W. Pekarski, *supra* note 3, at 9.

16. Deposition of Robert Lewis, Jr., *supra* note 3, at 50.

ment to which partisan political considerations are irrelevant.[17]

Under *Elrod* we must determine whether the Board could have directly commanded a deprivation of services to certain wards without violating plaintiff's rights. We think it is clear that a decision by the Board to allocate street services to certain wards to the exclusion of others would not have violated plaintiff's freedom of association. Nor did a violation of plaintiff's First Amendment rights follow the attempt by Gesualdi and Pekarski to deprive disfavored wards of plaintiff's services. This case thus does not fall under the *Elrod* variant of the doctrine of unconstitutional conditions. Whether an intentionally imbalanced allocation of street services would have violated the rights of residents of disfavored wards is not the question before us.

Plaintiff urges us to characterize the directives he chose to disregard as "politically motivated" directives. Thus plaintiff submits that his refusal to follow "politically motivated" instructions was a refusal "to join" with the faction of defendants Pekarski and Gesualdi and a refusal to participate in a political act, and that the termination of his employment was retaliation for failing "to

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17. It may be, if the facts were fully developed, that we would conclude that plaintiff's position was properly eliminated in an economy move of some sort. But on a motion for summary judgment we are bound to draw all inferences from the evidence in favor of the party opposing the motion — in this case, the plaintiff. Small v. Seldows Stationery, 617 F.2d 992 (3d Cir. 1980); *Zenith Radio corp.*, 513 F.Supp. at 1140. *Elrod* and *Branti* are not rendered irrelevant because instead of plaintiff's being "fired," his position may have been "eliminated." Plaintiff's contention that he lost his job because of his refusal to comply with the wishes of Pekarski and Gesualdi cannot be negatived by this argument. The protection afforded by *Elrod* and *Branti* includes "elimination" of a position in retaliation for an unpopular exercise of First Amendment rights. *See* DeLong v. United States, 621 F.2d 618, 622-23 n.4 (4th Cir. 1980) (collecting cases).

join" with the majority faction of the Board. The disturbing implications of this suggestion are patent. Few, if any, decisions made by elected officials are not somehow "political" in nature. Plaintiff's implied definition of "political", an exercise of will by a majority of members of an elected legislative body, extends to virtually every action taken by an elected legislative body. If plaintiff's position were to be adopted, federal courts might become involved in second-guessing state and local authorities and intruding into their daily affairs whenever an employee was discharged because he refused to execute a "political" decision with which he disagreed. This result would undermine divisions of authority and wreak havoc in state and local government administration.[18] Such a radical course of action finds support in neither law nor reason and we accordingly reject plaintiff's suggestion.

There is no evidence in the summary judgment record that the termination of plaintiff's employment was "solely for political purposes." Plaintiff's complaint states that he lost his job because he refused to obey certain directives. Although the directives which plaintiff disregarded may not have been delivered through the proper channels,[19] we are not moved to disregard what

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18. Judge Cahn has astutely observed that the "solely for political purposes" prerequisite to an *Elrod* claim may be grounded in concerns about federalism. Connors v. Cook, C.A. No. 80-1860, slip. op. at 6 (E.D.Pa. November 10, 1980).

19. Plaintiff makes much of a local ordinance which prohibits the Board or individual Commissioners from giving orders to certain Township employees. We judicially notice Section 27 of the Bristol Township Managers Ordinance which provides:

> Except for the purposes of inquiry the Board of Commissioners, its committees and its members shall deal with the administrative service solely through the Township Manager and neither the Board of Commissioners nor any of its committees nor any of its managers shall give orders — publicly or privately — to any subordinate of the manager.

Even though the Pekarski and Gesualdi directives would appear to have violated this ordinance, the ordinance does not create

plaintiff admits to have been the Board's motivation for his dismissal: his refusal to follow instructions. An employer's decision to discharge an employee because the employer in fact believed the employee to have been insubordinate, regardless of whether that belief was correct, is not a discharge solely for political purposes. Plaintiff's discharge may have been unjustified, but not every wrongful discharge from public employment bears constitutional infirmities.

The short of it is that *Elrod* and *Branti* to not extend to Abraham's case. He has not been penalized for an exercise of his freedom of association. Nor has he been penalized for preferring the course of nonassociation. We have not yet reached a point in the development of *Elrod* and *Branti* where public employees may override their superiors because they have a different view of what public policy should be. Accordingly, summary judgment will be granted in defendants' favor on plaintiff's *Elrod/Branti* claim.

IV. *THE DUE PROCESS CLAIM*

In evaluating plaintiff's due process claim we look primarily to whether he enjoyed a constitutionally-protected interest in his employment. Plaintiff may have possessed such an interest if he had had a "legitimate expectation" of continued employment under Pennsylvania law. *Bishop v. Wood*, 426 U.S. 341 (1976); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972). Although our jurisdiction rests upon the federal question raised in plaintiff's com-

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in plaintiff a First Amendment right to receive orders only from the township manager. Indeed, the idea that a statute can create a First Amendment right is antithetical to the First Amendment goal of barring legislative involvement in matters of speech, belief and association. Violation of this ordinance does not infringe plaintiff's First Amendment rights any more than would repeal of this ordinance altogether.

plaint, in determining whether plaintiff enjoyed a property right, we act much like a court attempting to apply state law in a diversity case.[20]

The Pennsylvania Local Ageny Law, Pa. Cons. Stat. Ann. tit. 2, §§501-508 (Purdon Supp. Pamphlet 1981), which governs proceedings of the Bristol Township Board of Commissioners, provides in relevant part:

> No adjudication of the local agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard.

Id. §533. An "adjudication" is defined as follows:

> Any final order, decree, decision, determination, or ruling by an agency, *affecting personal or property rights*, privileges, immunities, duties, liabilities, or obligations of any or all parties to the proceeding in which the adjudication is made.

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20. In determining what Pennsylvania courts would probably rule in a similar case, we look first to decisions by Pennsylvania's highest court. *See* Erie R. Co. v. Tompkins, 304 U.S. 64, 79 (1938); Becker v. Interstate Props., 569 F.2d 1203, 1205-1206 (3d Cir. 1977), *cert. den.*, 436 U.S. 906 (1978); Quinones v. United States, 492 F.2d 1269, 1273 (3d Cir. 1974). If there be no relevant decision by that court, then we must apply what we find to be the state law after giving "proper regard" to relevant rulings of other Pennsylvania courts. *See* Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1976); Fidelity Union Trust Co. v. Field, 311 U.S. 169, 177-78 (1940). Intermediate appellate court decisions which are the only exposition of the apposite law of the state and which have been in force and undisturbed over a course of years should be followed unless there is convincing evidence that state law is otherwise. Six Cos. v. Joint Highway District No. 13, 311 U.S. 180, 188 (1940); Fidelity Union Trust Co., *supra*. We must also be sensitive to doctrinal trends and the policies which informed prior adjudications by Pennsylvania courts. Becker v. Interstate Props., 569 F.2d at 1206. Lastly, we may also look to decisions in other courts as a Pennsylvania court might in informing its own decision.

Id. §101 (Emphasis supplied).

Defendants would have us end our inquiry at this point on the ground that the elimination of plaintiff's position was not an "adjudication" to which the Local Agency Law and due process clause applied, but was merely a decision by the Board to reduce the Township's budget by eliminating plaintiff's position. This distinction, however, is without any support in Pennsylvania law. The statute on its face applies to "any final . . . decision . . . affecting . . . property rights," and the Commonwealth Court has held that the Local Agency Law will apply to a termination of a position "for economy reasons" if an employee had a property right in his continued employment. *Sergi v. School Dist., City of Pittsburgh*, 28 Pa. Commonwealth 576, 368 A.2d 1359, 1361 (1977). The relevant inquiry then is whether Abraham had a property right in his employment.[21]

Section 26(N) of the Bristol Township Managers Ordinance, which we judicially notice and which applied to plaintiff's employment with the Township, provides that "no person shall be discharged without just cause." Plaintiff urges that this "just cause" provision gave him a property right in his employment protected by the Fourteenth Amendment's due process clause. Our answer to that proposition relies upon interpreta-

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21. We have given great weight to the Commonwealth Court's interpretation of the Local Agency Law. *See* text accompanying notes 22 and 23, *infra*. Even if defendants were correct in their argument that an elimination of a position was not an "adjudication", their motion would still fail because plaintiff has raised a genuine issue of material fact on this point. Plaintiff has adduced evidence showing that the majority faction had a political motive in removing plaintiff. The action by the Board eliminated only one position which was immediately filled by an acting director who received a salary increase. The position is still being filled by an acting director. There is thus a genuine question whether this was truly an elimination of a position for neutral fiscal reasons or merely a discharge of plaintiff clothed as an elimination of a position.

tions of the phrase "property rights" in the Pennsylvania Local Agency Law, for the test used by Pennsylvania courts to determine whether an employee had a property right in his employment for purposes of the Local Agency Law tracks the inquiry mandated by the Supreme Court as to whether an employee had a "legitimate expectation" of continued employment for purposes of the Fourteenth Amendment due process clause.[22]

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22. Defendants have urged us to abstain from deciding this question under the doctrine of Railroad Comm. v. Pullman Co., 312 U.S. 496 (1941). We conclude that application of the *Pullman* doctrine is inappropriate here because we are not confronted with an opaque question of state law, the resolution of which might avoid a substantial constitutional adjudication. *Cf.* D'Iorio v. County of Delaware, 592 F.2d 681 (3d Cir. 1978) (abstention required in public employee dismissal case when state law unclear, alternative state law interpretation could obviate a constitutional ruling, and erroneous federal ruling on state law would of necessity affect sensitive state policy). *Pullman* abstention is most appropriate, although not required, in instances where the state law has never been interpreted. *E.g.*, Reetz v. Bozanich, 397 U.S. 82 (1970). Abstention is less appropriate, and perhaps even irresponsible, where, as here, the state statute has been extensively scrutinized and interpreted by state courts and application of the statute to the case at bar does not involve a wild gamble at predicting state law, but can be made through a process of deduction from directly analogous case law.

Abstention should not be engaged in lightly for it is but a narrow exception to the duty of the federal courts to adjudicate controversies over which they have jurisdiction and is justified only in "special circumstances." Baggett v. Bullett, 377 U.S. 360, 375 (1964) (*citing* Propper v. Clark, 337 U.S. 472 (1949)). *See also* Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 813 (1976); Blake v. Kline, 612 F.2d 718, 727 (3d Cir. 1979), *cert. den.*, 447 U.S. 921 (1980). Chief Judge Latchum has gone so far as to hold that the party invoking the *Pullman* doctrine must show not only that resolution of an unsettled state law question will avoid a constitutional question, but must also show *the likelihood* of an alternative construction of state law which would make a constitutional adjudication unnecessary. United States v. Cargill, Inc., 508 F. Supp. 734, 738 (D.Del. 1981). Defendants have baldly invoked

Even though neither the Pennsylvania Supreme or Superior courts have directly ruled on whether employment protected by a "just cause" provision gives rise to a property right under the Local Agency Law,[23] the numerous interpretations of that Act by the Commonwealth Court provide very strong support for finding such a right and fail to indicate that such a property right would not be found to exist. Although neither the Pennsylvania Supreme Court nor Superior Court have written on the issue of what constitutes a property right under the Local Agency Law, we believe that the opinions of the Commonwealth Court provide a reliable guide to the state of the law in Pennsylvania. Although it is only an intermediate appellate court or, depending upon the parties and nature of the suit, a court of original jurisdiction, *see* Pa. Cons. Stat. Ann. tit. 42, §§761 & 762 (Purdon 1981), the Commonwealth Court's expertise in matters involving the regulation of the affairs of

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the *Pullman* doctrine without setting forth *any* special circumstances justifying the renunciation of our jurisdiction. Nor have they advanced any likely interpretation of state law which will avoid a federal constitutional question. We therefore will not decline to exercise our obvious jurisdiction over this case.

23. We note that the Bucks County Court of Common Pleas, in Worrell v. Falls Twp., 33 Bucks 216 (1979), found that a local ordinance similar to the one involved here created a property right in employment. *Worrell* is not directly relevant here because it seems, in light of *Worrell's* reliance on Penuel v. Uwchlan Twp., 40 Pa. Commonwealth 512, 397 A.2d 865 (1979), and D'Iorio v. County of Delaware, 447 F.Supp. 229 (E.D.Pa.) *vacated*, 592 F.2d 693 (3d Cir. 1979), that the employee's property right in his employment was not derived from the "just cause" provision in the local ordinance. Moreover, we do not believe that the reasoning of *Worrell* would be followed by the Pennsylvania Supreme Court.

We also note that, in Riddick v. Cuyler, No. 81-0246 (E.D.Pa. September 22, 1981), Judge Newcomer found that a "just cause" provision in the Pennsylvania Civil Service Act created a property right in employment.

political subdivisions commands much deference because it has nearly exclusive jurisdiction over appeals involving such matters from Courts of Common Pleas. *See* Pa. Cons. Stat. Ann. tit. 42, §762(a)(4) (Purdon 1981).[24] We turn now to examine the meaning of "property right" under the Local Agency Law as interpreted by the Commonwealth Court.

The general test for a property right under the Local Agency Law is whether the employee had "an enforceable expectation of continued employment which has been guaranteed either by contract or statute." *Sergi v. Pittsburgh School District*, 368 A.2d at 1861. *See also Necci v. School Dist. of City of Erie*, 53 Pa. Commonwealth 259, 416 A.2d 1171 (1980); *Fair v. Delaney*, 35 Pa. Commonwealth 103, 385 A.2d 601 (1978). The requisite "enforceable expectation" will never occur in an employment relationship permitting discharge of the employee at the will and pleasure of the employer. *See, e.g., Hoffman v. Montour County*, 50 Pa. Commonwealth 101, 411 A.2d 1319 (1980), *Amesbury v. Luzerne County Inst. Dist.*, 27 Pa. Commonwealth 418, 366 A.2d 631 (1976). A property right will exist, however, whenever an employee has a right not to be discharged but for a particular reason. In other words, as long as an employee is not an "at will" employee, he will have a property right in his employment which can be terminated only in accordance with the Local Agency Law.

This conclusion is amply demonstrated by *Kretzler v. Ohio Township*, 14 Pa. Commonwealth 236, 322 A.2d 157 (1974). In that case, a policeman claimed that the Local Agency Law had been violated when he had been reduced in rank without a hearing. A state statute pro-

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24. Indeed, in recognition of the Commonwealth Court's special role in resolving disputes concerning local agency affairs, the Superior Court has declined to exercise its shared jurisdiction over some of those cases and has instead transferred them to the Commonwealth Court's docket. *See, e.g.*, Valley Forge Indus. v. Armand Constr. Inc., 248 Pa. Super. 53, 374 A.2d 1312, 1316 (1977).

vided that no regular full-time officer could be reduced in rank except for certain enumerated reasons. The court never even mentioned the enumerated reasons in its opinion.[25] It was sufficient for the court that the officer was protected from discharge for any or for no reason at all. "As such, this statutorily conferred right is a property or personal right within the meaning of adjudication as defined by the [Local Agency Law]." *Kretzler*, 322 A.2d at 160. This approach to identifying a property right in public employment has been applied in other contexts without exception. *See e.g., Berger v. School Dist.*, 29 Pa. Commonwealth 313, 370 A.2d 1244 (1977) (school employee had property right in employment due to statute which, "by enumerating four reasons for the suspension of professional employees, in effect grants employees the right to be suspended for those reasons only"); *Fatscher v. Board of School Directors*, 28 Pa. Commonwealth 170, 367 A.2d 1130 (1977) (same). *Cf. Ambron v. Philadelphia Civil Serv. Comm.*, 54 Pa. Commonwealth 488, 422 A.2d 225 (1980) (statute created immunity to arbitrary transfer).

We find a great deal of similarity between Abraham's case and two other cases in which a public employee was found to have possessed a property right in his employment. In *DiCello v. Board of Directors of Riverside School Dist.*, 33 Pa. Commonwealth 39, 380 A.2d 944 (1977), the court held that an untenured temporary employee had a property right in her employment because she could not be dismissed but for "unsatisfactory performance." *Zimmerman v. Johnstown*, 27 Pa. Commonwealth 42, 365 A.2d 696 (1976), held that an employee who could not be suspended but for "miscon-

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25. The statutory reasons were (1) physical or mental disability; (2) neglect or violation of duty; (3) commission of a misdemeanor or felony; (4) inefficiency, neglect, intemperance, disobedience of orders, or conduct unbecoming an officer; and (5) intoxication while on duty. Pa. Cons. Stat. Ann. tit. 53, §812 (Purdon 1974).

duct" or "violation of any law of this Commonwealth, any ordinance of the city, or regulation of the [local] department" had a property right in his employment.

As in *DiCello* and *Zimmerman*, the statute involved in Abraham's case does not set forth particularized, enumerated reasons permitting discharge; it merely sets forth a broad, flexible standard — "just cause — against which the reasons for discharge were to be judged. The permissible ground for discharge is sufficiently specific, however, to distinguish Abraham from an "at will" employee and give him an enforceable expectation in continued employment. The "just cause" provision in Abraham's case is thus analogous to the standards for dismissal in *DiCello* ("unsatisfactory performance") and *Zimmerman* ("misconduct") in these material respects.

The Local Agency Law, in one form or another, has been part of the law in Pennsylvania for approximately fourteen years. The Law has been the subject of much litigation resulting in extensive judicial scrutiny and interpretation. Significantly, no decision by a Pennsylvania appellate court suggests that a "just cause" provision is inadequate to establish a property right. The only cases in which no expectation of continued employment was found involved at will employees. Clearly, Abraham was not an "at will" employee. In light of the foregoing discussion, we are reasonably confident that Pennsylvania courts would find that Abraham had an enforceable expectation of continued employment, i.e., a property right, in his job and would have been entitled to a pretermination hearing under the Local Agency Law.

We have also examined Pennsylvania doctrinal trends beyond the immediate context of the Local Agency Law and have found nothing to suggest that the Commonwealth Court decisions upon which we rely are aberrational. For example, in *Boressen v. Rohm & Haas, Inc.*, C.A. No. 78-2292 (E.D.Pa. Nov. 30, 1981), Chief Judge Lord traced the development of Pennsylvania Law on wrongful discharge from the traditional position that

an "at will" employment contract may be terminated by either the employer or the employee "at any time, for good reason, bad reason, or no reason at all," *id.* slip op. at 3 (citing *Henry v. Pittsburgh & Lake Erie R. Co.*, 139 Pa. 289, 21 A.157 (1891)), to the current position that "when the discharge of an employee-at-will threatens public policy, the employee may have a cause of action against the employer for wrongful discharge." *Id.* slip op. at 4 (*quoting Yaindl v. Ingersoll-Rand Co.*, 281 Pa. Super. 560, 422 A.2d 611, 617 (1980)). Chief Judge Lord was careful to point out that *Yaindl* is not the "first case in a liberalizing trend in Pennsylvania," *id.* slip op. at 15, and that the law of wrongful discharge still condones arbitrary discharges except when the public policy exception is applicable or in the absence of a specific statutory or contractual restriction.

Although it is not directly applicable to the case at hand, in terms of its value as evidence of a doctrinal trend, *Boresson's* survey of Pennsylvania law tends to support our conclusion. First, *Boresson* reveals that Pennsylvania's law of wrongful discharge makes exception for employment relationships subject to a specific statutory restriction. Such a statutory restriction exists in the local ordinance which governed Abraham's employment. Secondly, dismissal in violation of the local ordinance conceivably could fall within the public policy exception to the law's condonation of arbitrary discharges. At the very least, *Boresson* reveals that our conclusion is not contrary to the direction of Pennsylvania law.

Our prediction of the judgment of Pennsylvania courts finds support in the responses of other courts to questions similar to that at bar. Although it is not determinative, for the essential question before us is ultimately one of Pennsylvania law, the United States Supreme Court, in interpreting a federal statute, has held that a public employment contract subject to a "just cause" provision gave rise to a property right protected

by constitutional due process. *Arnett v. Kennedy*, 416 U.S. 134, 152-53 (1974). *See also Bishop v. Wood*, 426 U.S. at 346 n.8 (1976). Equally important, the Supreme Court and many Courts of Appeals have held that a state property right was created by a "just cause" or an equivalent provision in an employment relationship and was entitled to constitutional protection. *E.g., Perry v. Sindermann, supra* 603 (1972) (Texas law); *Thompson v. Bass*, 616 F.2d 1259 (5th Cir.) (Alabama law), *cert. den. sub nom., Thompson v. Turner*, 449 U.S. 983 (1980); *Glenn v. Newman*, 614 F.2d 467 (5th Cir. 1980) (Georgia law); *Needleman v. Bohlen*, 602 F.2d 1 (1st Cir. 1979) (Massachusetts law); *Brenna v. Southern Colo. State College*, 589 F.2d 475 (10th Cir. 1978) (Colorado law); *Jacobs v. Kunes*, 541 F.2d 222 (9th Cir. 1976) (Arizona law), *cert. den.*, 429 1094 (1977).

For the foregoing reasons, we believe that the record on the summary judgment motion shows that plaintiff had a state property right in his employment which was protected by the due process clause of the Fourteenth Amendment. Defendants' motion for summary judgment is therefore denied with respect to plaintiff's due process claim. An appropriate order follows.

Edward R. Becker, J.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ABRAHAM K. ABRAHAM	:	CIVIL ACTION
	:	
v.	:	
	:	
JAMES W. PEKARSKI, et al.	:	NO. 79-3912

MEMORANDUM

Newcomer, J. May 24, 1983.

Before the Court is plaintiff's petition for an award of attorney's fees under 42 U.S.C. §1988. The parties have presented their respective positions in writing, and orally, at a evidentiary hearing held on May 19, 1983. I now make the following findings of fact.

The hourly rate claimed by both attorneys, Lewis A. Walder and Marshall E. Kresman, $75.00 per hour, is reasonable for work of the type and quality involved and is not excessive in light of the rates customarily charged by attorneys in this area for similar work.

The hours spent by plaintiff's attorneys on this matter, as set forth in their affidavit in support of supplemental motions for allowance of attorneys' fees under 42 U.S.C. §1988,[1] were reasonable and necessary to litigation of the claim upon which plaintiff prevailed at trial, with the following exceptions. In lieu of awarding plaintiff fees at his attorneys' hourly rate for time spent on the initial client interview on September 4, 1979 I will award plaintiff $10.00, his attorneys' advertised initial consultation fee. In addition, I will not award plaintiff

1. By order of February 3, 1983, I required plaintiff to supplement his petition for attorney fees so as to show which of the hours he initially claimed were spent in connection with plaintiff's claim of unlawful deprivation of a property right in violation of 42 U.S.C. §1983, upon which plaintiff prevailed at trial.

fees for time spent on September 17, 1979, September 21, 1979, and March 12, 1981, as the claim for these hours was withdrawn at the time of the evidentiary hearing. The total number of hours compensable at the hourly rate is therefore 120.3. The lodestar is therefore 120.3 times $75.00 plus $10.00, or $9,032.50.

No adjustment to the lodestar for the quality of the attorneys' work would be appropriate in this case. Counsel's hourly rate adequately compensates them for the quality of their work.

No multiplier should be applied to the lodestar for contingency or other factors. While it is true that plaintiff's due process claim was somewhat novel, and that the time elapsed from the following of this initial complaint to the entry of judgment in his favor was unusually long, it is also true that counsel initially undertook this case on a contingent fee arrangement, as a claim for lost wages. Plaintiff's lost wages were approximately $8,000, and his total award of compensatory and punitive damages was $27,365.47. The lodestar figure is remarkably close to ⅓ of plaintiff's jury award, the amount of fees counsel bargained for when they undertook the case. Arguably, the contingent fee arrangement should serve as a cap on the amount of fees plaintiff may recover, although I eschew any such hard and fast rule. Nevertheless, weighing the contingent fee arrangement and the fact that the claim upon which plaintiff prevailed was simply an individual entitlement claim against the factors that weigh in favor of applying a multiplier, I conclude that no multiplier is appropriate. I note that I do not underestimate the importance of this case to Mr. Abraham personally, and I am aware that first amendment issues of some public interest were implicated in this lawsuit. However, the jury verdict in plaintiff's favor was not on his first amendment claim, but rather represented simply the jury's determination that plaintiff had been deprived of a property right, his job, in a grossly unfair manner.

In accordance with the above, I will enter judgment in favor of plaintiff for attorney fees in the total amount of $9,032.50. Plaintiff's petition for taxation of cost will be referred to the Clerk of Court, and determination thereof may be deferred until the pending appeal from the underlying judgment is resolved.

CLARENCE C. NEWCOMER, *J.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ABRAHAM K. ABRAHAM	:	CIVIL ACTION
	:	
v.	:	
	:	
JAMES W. PEKARSKI, et al.	:	NO. 79-3912

ORDER

AND NOW, this 24th day of May, 1983, it is hereby Ordered that plaintiff's petition for an award of attorney fees is GRANTED in part and DENIED in part. Upon consideration of this motion, it is hereby Ordered that judgment is entered in favor of plaintiff and against the defendants, jointly and severally, for attorney fees in the amount of $9,032.50.

Plaintiff's petition for an award of costs is referred to the Clerk. Determination of this petition may be deferred until resolution of the pending appeal from the judgment entered September 24, 1982.

AND IT IS SO ORDERED.

CLARENCE C. NEWCOMER, *J.*

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-1135, 83-1151 and 83-1419

ABRAHAM, ABRAHAM K.

v.

PEKARSKI, JAMES W., ind. and as PRESIDENT, Board of Commissioners, Township of Bristol, MASCIA, MARIE L., ind. and as VICE PRES., Board of Commissioners, Township of Bristol, COTUNGO, CHASER J., ind. and as Commissioner, Township of Bristol, SOMMERER, WILLIAM H., ind. and as Commissioner, Township of Bristol, GESUALDI, ANTHONY V., ind. and as Commissioner, Township of Bristol, LEWIS, ROBERT, JR., ind and as Commissioner, Township of Bristol. CATTANI, JENNIE, ind. and as Commissioner, Township of Bristol, CATANIA JERRY, ind. and as Commissioner, Township of Bristol, WURM, ALBERT W., ind. and as Commissioner, Township of Bristol, MELIO, ANTHONY J., ind. and as Commissioner, Township of Bristol, and TOWNSHIP OF BRISTOL

Township of Bristol, James W. Pekarski, Marie L. Mascia, Chaser J. Cotungo, William H. Sommerer, Anthony V. Gesualdi, Robert Lewis, Jr., Jennie Cattani, Jerry Catania, Albert M. Wurm, and Anthony J. Melio,

Appellants in Nos. 83-1135 and 83-1419

Abraham K. Abraham, Appellant in No. 83-1151

(D.C. Civil No. 79-3912)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Argued: November 29, 1983
Before GIBBONS and SLOVITER, *Circuit Judges*
and CALDWELL, *District Judge**

(Opinion filed February 13, 1984)

Clyde W. Waite, Esq. (Argued)
Steif, Waite, Gross & Sagoskin
410 Mill Street
Bristol, Pennsylvania 19007

Attorney for Appellants
Township of Bristol, et al.

Marshall E. Kresman, Esq. (Argued)
Walder, Martin & Kresman, P.C.
1953 Street Road
Bensalem, Pennsylvania 19020

Attorney for Abraham K. Abraham

OPINION OF THE COURT

GIBBONS, *Circuit Judge:*

Abraham K. Abraham, the former Director of Roads and Public Property of Bristol Township, Pennsylvania, recovered a jury verdict against the Township and certain members of its Board of Commissioners for $17,365.47 in compensatory damages, and against five

---

* Hon. William W. Caldwell, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

individual Commission members for $2,000 each in punitive damages. The district court also awarded Abraham attorneys' fees as a prevailing party. Abraham's civil rights action arises out of his dismissal by a majority of the Commission on July 25, 1979. His amended complaint alleges that Abraham had been dismissed solely on the basis of his political beliefs. *see Elrod v. Burns*, 427 U.S. 347, 355-73 (1976) (Brennan, J.); *id.* at 374-75 (Stewart, J.); *Branti v. Finkel*, 445 U.S. 507, 513-20 (1980), and that he had been deprived of a property interest in employment without a hearing. The district court dismissed Abraham's *Elrod* claim on summary judgment; Abraham then prevailed on the due process theory at trial.

The defendants now appeal from the judgment in Abraham's favor on the due process theory, contending that the district court erred in denying their motions for judgment notwithstanding the verdict and for a new trial. Defendants also object to the allowance of certain hours in the computation of attorneys' fees, and to the holding that Abraham is a "prevailing party." Abraham cross-appeals from the grant of partial summary judgment in favor of the defendants on his *Elrod* claims and on claims seeking damages for intentional infliction of emotional distress. During oral argument, Abraham conceded that if we affirm the judgment in his favor on due process grounds, then his cross-appeal on the *Elrod* issue is moot, in that a verdict in his favor on that issue or on the emotional distress claims would not support an award of further relief. We affirm the judgment in Abraham's favor, and dismiss his cross-appeal as moot.[1] We also affirm the district court's award of fees.

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1. The district court opinion on the *Elrod-Branti* issue is reported. *See* Abraham v. Pekarski, 537 F. Supp. 858 (E.D. Pa. 1982). Because of our disposition of Abraham's cross-appeal, we have no occasion to approve the trial court's analysis of the *Elrod-Branti* question.

I.

The Bristol Township Board of Commissioners is elected from wards. The defendant James Pekarski is its president. During 1978 and 1979, Pekarski led a majority faction of the Board consisting of himself and defendants Anthony Gesualdi, Jeannie Cattani, Jerry Catania, Marie Mascia, and Anthony Melio. Four of the defendants — Chaser Cotugno, William Sommerer, Robert Lewis, and Albert Wurm, representing wards 1, 2, 4, and 7, respectively — comprised a minority faction of the Board. Until July 25, 1979, Abraham, a civil engineer, served as Director of Roads and Public Property. His amended complaint charges that the faction led by Pekarski directed him to withhold municipal services from Township wards represented by members of the minority faction. It charges further that when he refused to cooperate by withholding road work in those wards, he was discharged without a hearing.

Abraham advanced two legal theories in the trial court. He contended, first, that his discharge was in retaliation for his refusal to join a majority political faction in the municipality, and thus was in violation of the federal substantive liberty interest recognized in *Elrod v. Burns*, 427 U.S. 347, 355-73 (1976) (Brennan, J.), *id.* at 374-75 (Stewart, J.), and *Branti v. Finkel*, 445 U.S. 507, 513-20 (1980). He also contended that he had a state law property interest in continuing employment, which was terminated without due process of law. The defendants, without filing any affidavits, moved for summary judgment on both theories. The trial court granted their motion with respect to the *Elrod-Branti* ground, but held that Abraham did have a Pennsylvania law property interest in employment. *Abraham v. Pekarski*, 537 F. Supp. 858, 866-71 (E.D. Pa. 1982). Thus, the district court denied defendants' motion for summary judgment on Abraham's due process claim, and the case proceeded to trial on that theory.

II.

The defendants urge somewhat half-heartedly that no evidence adduced at trial supported Abraham's due process claim. That contention is frivolous. It was conceded in the trial court that Abraham was discharged without any hearing whatsoever. If Abraham had a property interest in not being discharged except for good cause, the conceded fact that he was discharged without a hearing is alone enough to support the verdict in his favor. The trial court, in a ruling that was more favorable to the defendants than that to which they were entitled, required that the jury also find that Abraham's discharge was not for just cause. That ruling was erroneous. A post-termination judicial finding respecting an employment dismissal is not a substitute for a pre-termination due process hearing. *See Perri v. Aytch*, No. 83-1072, slip op. at 9-11 (3d Cir. Dec. 22, 1983). The jury verdict, in any event, determined that Abraham was not terminated for just cause. That verdict is amply supported by evidence tending to suggest that the majority of the Board discharged Abraham because he refused to cooperate with them in withholding municipal services from wards represented by members of the minority faction. *See* App. at 95-108, 166-73, 194-201.

With greater enthusiasm, the defendants also contend that they were entitled to summary judgment, and to judgment notwithstanding the verdict, because the trial court erred in holding that Abraham had a Pennsylvania law entitlement. In a well-reasoned portion of the district court's opinion addressing the due process theory, the district court rejected this contention. *See* 537 F. Supp. at 866-71. The court noted that Section 26(n) of the Bristol Township Managers Ordinance governed Abraham's employment. That section provides that "no person shall be discharged without just cause." *Id.* at 868. The court also noted that the Pennsylvania Local Agency Law, 2 Pa. Cons. Stat. Ann. §§501-508, 551-555

(Purdon Supp. 1983), governs proceedings of the Bristol Township Board of Commissioners. That state statute requires notice and an opportunity to be heard with respect to agency determinations affecting personal or property rights. *Id.*, §553. Finally, the court noted that under Pennsylvania law, an enforceable expectation in continued employment, guaranteed either by contract or by law, is a property right under the Local Agency Law. *See* 537 F. Supp. at 869. The court's treatment of the Pennsylvania Agency Law and the cases construing it is thorough and need not be repeated here. We agree that under those authorities, Abraham had a property interest in his employment. We note as well that the district court's analysis is consistent with our decision in *Perri v. Aytch*, No. 83-1072, slip op. at 7-9, holding that Pennsylvania court regulations authorizing dismissal "for just cause" give rise to a property interest in employment under Pennsylvania law.

The verdict in Abraham's favor on his claim of deprivation of a property interest in employment without due process is amply supported in law and in fact. The trial court did not err in denying defendants' motions for summary judgment or for judgment notwithstanding the verdict.

III.

Although the jury did not award punitive damages against the Township, *see City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981), it did award such damages against several individual Commission members. These appellants contend that there is insufficient evidence to support the imposition of punitive damages. Consequently, they argue, their motion for judgment notwithstanding the verdict with respect to punitive damages should have been granted. We hold that the defendants' objection to punitive damages was not preserved in a motion for directed verdict, and therefore

may not be raised in a motion for judgment notwithstanding the verdict. We also hold, assuming *arguendo* that the issue of punitive damages could be raised, that the evidence supports the jury's verdict.

A.

The parties stipulated to a bifurcated trial on liability and damages. At the close of Abraham's case on liability issues, counsel for defendants moved for a directed verdict on Count 4 of the complaint. Count 4 alleges a pendent state law claim for intentional infliction of emotional distress. After the court postponed ruling on that motion, the following colloquy ensued:

> THE COURT: Now wait a minute. Is that the sole motion that you have?
>
> MR. WAITE: I would move for a directed verdict on the remaining claims of the plaintiff as well.
>
> THE COURT: All right.
>
> MR. WAITE: That the evidence is not sufficient, viewed in the light most favorable to the plaintiff.
>
> THE COURT: All right. I think it is clearly a jury issue and I will deny your motion.

App. at 246-47. This is the only reference by defendants to the sufficiency of the evidence. It is plainly addressed to the sufficiency of the evidence on liability, not on damages. That motion cannot reasonably be considered to have alerted the trial court or opposing counsel that the defendants were contending for a stricter evidentiary standard with respect to punitive damages.

At trial, defendants maintained that they discharged Abraham for reasons of economy, and therefore for just cause. At the close of trial, counsel for defendants approved a verdict slip containing the interrogatory on liability agreed upon by stipulation:

> Was plaintiff fired from his position without just cause or was plaintiff's position eliminated by reason of economy?

App. at 281. After a charge to which the defendants made no objection, the jurors returned a verdict "that the plaintiff Abraham K. Abraham lost his position as Director of Roads and Public Property of Bristol Township because he was fired from that position without just cause and we therefore find for the plaintiff on the issue of liability." App. at 317. Thus, the jury expressly rejected the explanation tendered by the defendants that they acted, in discharging Abraham, for reasons of economy.

The trial resumed the next day on damage issues, the evidence for which is reviewed below. At the conclusion of Abraham's case, counsel for defendants made no motion with respect to the sufficiency of the evidence. *See* App. at 361. Nor did defendants offer any damage testimony. Thus, at no point in the trial did defendants make a motion for directed verdict on punitive damages. Before the damage interrogatories were submitted to the jury, however, they were shown to counsel. At that point, counsel offered the only objection addressed to punitive damages during these proceedings:

> MR. WAITE: Well, I would have an objection to punitive damages generally as to any of the defendants. Any action that was taken by them would have to be in their capacity as township managers and as commissioners and acting on behalf of the township. I don't believe that punitive damages would be appropriate.

App. at 363. This ground for objection to the submission of the punitive damages issue to the jury was groundless, for as Abraham's counsel noted immediately, while a municipality may not be held liable for punitive damages under section 1983, municipal officials can be. *See*

City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 69 (1981) ("[b]y allowing juries and courts to assess punitive damages against the offending official, based on his personal financial resources, [section 1983] directly advances the public's interest in preventing repeated constitutional deprivations"). Thus, at no point before the case was submitted to the jury did defendants raise *any* question about the sufficiency of the evidence to support an award of punitive damages.

The court charged, with respect to punitive damages, as set forth in the margin.[2] The defendants made no objection to the charge, and sought no instruction as to what evidence would be required to sustain an award of punitive damages.

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2. In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct.

If you should find from a preponderance of the evidence in the case that the acts of one or more of the defendants which proximately caused actual injury or damage to the plaintiff or deprived him of his constitutionally protected rights were maliciously, or wantonly, or oppressively done, then you may, if in the exercise of discretion you unanimously choose so to do, add to the award of actual or nominal damages such amount as you shall unanimously agree to be proper as punitive and exemplary damages.

An act or a failure to act is maliciously done if prompted or accompanied by ill will, or spite or grudge, either toward the injured person individually, or toward all persons in one or more groups or categories of which the injured person is a member.

An act or a failure to act is wantonly done if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

An act or a failure to act is oppressively done, if done in a way or manner which injures or damages or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness or disability or misfortune of another person.
App. at 385-86.

Since no objection was made on the ground now relied on to instructing the jury on punitive damages, the defendants cannot rely on that instruction as error. Fed. R. Civ. P. 51. Moreover, a Rule 50(b) motion for judgment notwithstanding the verdict may not be made on grounds that were not asserted in a motion for directed verdict. *Mallick v. International Brotherhood of Electrical Workers*, 644 F.2d 228, 233-34 (3d Cir. 181); *Wall v. United States*, 592 F.2d 154, 159-60 (3d Cir. 1978); *Lowenstein v. Pepsi-Cola Bottling Co.*, 536 F.2d 9, 10-11 (3d Cir.), *cert. denied*, 429 U.S. 66 (1976). As noted above, no directed verdict motion questioned the sufficiency of the evidence to support an award of punitive damages. On this record, therefore, it would be improper to grant relief from the judgment entered on the verdict awarding Abraham punitive damages.

B.

Even if we were free to consider the point, however, the defendants' argument as to the insufficiency of the evidence which would justify an award of punitive damages is singularly unpersuasive. Because most of the evidence respecting Abraham's lost earnings were stipulated to by the defendants, Abraham testified only briefly on that aspect of his damage claim. Abraham also testified about the manner of his firing, which had occurred without notice and which was effective immediately:

> [Township Manager Mark] said [that Abraham was fired] "immediately." From the very moment on. That means I am a culprit or a criminal or some sort of very heinous [person] . . . [T]his [was] not [even] a pay period ending time.

App. at 343. Exploring the effect that this abrupt (and in the jury's eyes unjust) termination had on him, Abraham testified:

> I'm thrown away like I don't know what expression I should use. Then I felt I cannot hold my — my feet

> can't hold my weight. I sat down and I thought I am falling through, I am shattering into broken pieces . . . , something like that, because with this [occurrence,] if somebody asked you [why you were] fired suddenly, . . no organization is going to accept you for a job.

App. at 343-44. Thereafter, when he was given his final pay check, Abraham was told by the Assistant Township Manager that "[Y]our position has been eliminated." App. at 356. This was the only official information Abraham had received. *Id.* At the time when the jury heard this testimony, it had already rejected defendants' contention that Abraham's position had been eliminated for budgetary reasons.

The jury could well find, on this record, that the individual defendants acted, in firing Abraham, with ill will and oppressively. Ill will could be inferred from the credited testimony that Abraham was fired for refusing to cooperate in defendants' designs to reduce municipal services for residents in the wards represented by council members in the minority faction. Oppressive action could be inferred from the failure to give Abraham notice of a hearing, from the failure to give him reasonable notice of termination, from the abruptness of his discharge and its impact on him, and from the pretext with which, according to the credited testimony, the reason for that discharge was clothed. Viewing the entire evidence in the light most favorable to Abraham, we cannot say that the record "is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief." *Denneny v. Siegel*, 407 F.2d 433, 439 (3d Cir. 1969); *see Stanton v. Astra Pharmaceutical Products, Inc.*, 718 F.2d 553, 568 (3d Cir. 1983). Thus even if we were on this record free to reach the punitive damage question, the verdict would stand.

IV.

The defendants urge that they are entitled to a new trial because they were entitled to have the jury consider whether they acted in good faith and with reasonable belief in the legality of their actions. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982); *Wood v. Strickland*, 420 U.S. 308, 322 (1975). The defendants did not move for summary judgment on this ground. They made no motion for a directed verdict or for a judgment notwithstanding the verdict on this ground. They requested no instruction on their good faith, and made no objection to the court's failure to charge on that issue. Thus, the good faith immunity defense cannot be considered here. *See, e.g., Caisson Corp. v. Ingersoll Rand Co.*, 622 F.2d 672, 680 (3d Cir. 1980). Moreover, even if the issue had been raised in the trial court, we doubt that on this record the defendants would have been entitled to a good-faith belief immunity charge. They tried the case not on the theory that they believed they were legally entitled to fire Abraham without cause, but on the theory, discredited by the jury, that solely for budgetary reasons they had abolished his position. No issue of good faith belief was tendered by the evidence.

V.

By letter, after briefs were filed, the defendants called to our attention the decision in *Aitchison v. Raffiani*, 708 F.2d 96, 98-100 (3d Cir. 1983), holding that the rule of *Tenney v. Brandhove*, 341 U.S. 367 (1951) — recognizing a federal common law rule of legislative immunity from damage actions for legislative activities — applies to the legislative actions of municipal governing bodies. Although the letter is cryptic, we read it as contending that this rule barred an award of punitive or compensatory damages against the individual defendants.

At no point did the defendants contend in the district court that they were entitled to absolute immunity because, in firing Abraham, they acted legislatively. Because the contention was never presented to the district court, it may not, absent special circumstances such as the announcement of a new rule of law, be considered here. There are no such circumstances. The availability of a legislative immunity defense in section 1983 damage actions has been settled since 1951. Case law in other courts antedating the trial of this action recognized the applicability of the *Tenney v. Brandhove* rule to legislative actions of subsidiary units of state governments having legislative powers. *See Hernandez v. City of LaFayette*, 643 F.2d 1188, 1192-94 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 611-15 (8th Cir. 1980); *see also Reed v. Village of Shorewood*, 704 F.2d 943, 952-53 (7th Cir. 1983); *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 829-30 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 1431 (1983); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349-50 (9th Cir. 1982). Thus, the defendants had no reason to suppose that such a defense would be rejected if in fact they were acting in a legislative capacity. It is too late, at this stage, to rely on that defense as a ground for granting a judgment notwithstanding the verdict.

In any event, however, the legislative immunity defense, even if it had been asserted in the trial court, is not on this record a ground for a judgment notwithstanding the verdict. As *Aitchison v. Raffiani* clearly articulates, it is available only for "legislative," as distinct from managerial, activities of members of local governments. 708 F.2d at 99. The evidence is undisputed, Pennsylvania law makes clear, and the jury's verdict necessarily establishes, that in this instance the individual defendants did not act in a legislative capacity.

In Pennsylvania, as in most states, municipal corporations are given by legislation a combination of propri-

etary, managerial, and legislative powers. It is only with respect to the legislative powers delegated to them by the state legislatures that the members of governing boards of municipal corporations enjoy legislative immunity. Necessarily, therefore, the first inquiry with respect to the application of such immunity must be whether those claiming it were performing delegated legislative, rather than proprietary or managerial, functions. Moreover, since municipal corporations have been delegated legislative authority only within strictly defined statutory limits, they can only act legislatively when following the statutory procedures specified for such action. *See Philadelphia Presbytery Homes, Inc. v. Board of Comm'rs*, 440 Pa. 299, 306-09, 269 A.2d 871, 847-75 (1970). The fact that the action complained of resulted from a vote of the members of the governing body is not dispositive, for in the exercise of non-legislative powers all corporate bodies require a vote of their governing bodies.

Bristol Township functions under the First Class Township Code, Pa. Stat. Ann. tit. 53, §§ 55101 to 58502 (Purdon 1957 & Supp. 1983). The corporate powers of First Class Townships are set forth in Article XV, *id.* §§ 56501-56590. The Township Board of Commissioners is vested with all of the Township's corporate powers. *Id.* § 56502. Legislative powers, however, must be exercised by the adoption of "ordinances" enacted in compliance with specified procedures:

> All such proposed ordinances, unless otherwise provided by law, shall be published at least once in one newspaper of general circulation in the township not more than sixty days nor less than seven days prior to passage. Publication of any proposed ordinance shall include either the full text thereof or the title and a brief summary prepared by the township solicitor . . . . No ordinance, or resolution of a legislative character in the nature of an ordinance, shall be

> considered in force until the same is recorded in the ordinance book of the township.

Pa Stat. Ann. tit. 53, § 56502 (Purdon Supp. 1983). The Township Code recognizes the distinction between the Township's legislative and its proprietary or managerial powers, for section 56504 authorizes the Commissioners to delegate non-legislative powers to a Township Manager. In Township Ordinance No. 384 (Nov. 15, 1961), Bristol Township did so. Bristol Township Code §§ 21-30, Exh. P-3, App. at 435-38. One of the Manager's delegated non-legislative functions is the hiring and discharge of township employees. *Id.*, § 26(n), App. at 437. Thus, the decision to hire or fire subordinates of the Township Manager is plainly managerial rather than legislative.

In this case the record is clear. There is no evidence whatsoever that the Board's action was published in a newspaper of general circulation 60 days in advance of the action, or recorded in the ordinance book of the township. The jury found, in answer to the special interrogatory on liability, that Abraham was "fired" by the Board from a position subordinate to the Township Manager. Discharge from that position is by statute and ordinance a non-legislative function. Plainly, therefore, the decision to fire Abraham was as a matter of law managerial, not legislative.

Thus we reject the defendants' belated attempt to obtain a judgment notwithstanding the verdict on grounds of legislative immunity.

VI.

Defendants' final objection to the judgment of the district court is to the award of counsel fees pursuant to 42 U.S.C. § 1988 (Supp. V 1981). That objection is groundless. Although Abraham did not prevail on each of his legal theories, he obtained the relief he sought. *See Hensley v. Eckerhart*, 103 S. Ct. 1933, 1939 (1983)

(" 'plaintiffs may be considered "prevailing parties" for attorneys' fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit' ").

The trial court correctly applied those standards governing the calculation of the award. The defendants except to the inclusion in the lodestar of hours expended in depositions arguably directed to the *Elrod-Branti* claim. Those depositions were used at trial, however, in establishing the due process claim. The court concluded that the time in issue was reasonably expended in the claim on which Abraham prevailed. That ruling is entirely consistent with *Hensley v. Eckerhart*, 103 S. Ct. at 1940 (lawsuit cannot be viewed as a series of discrete claims when claims "involve a common core of facts").

VII.

The judgments appealed from in No. 83-1135 and No. 83-1419 will be affirmed. The appeal is No. 83-1151 will be dismissed, without costs, as moot.

SLOVITER, *Circuit Judge*, concurring.

I join in Parts I through IV and Parts VI and VII of the majority's opinion.

As to Part V, I agree that because defendants did not raise in the district court the claim that they were entitled to a legislative immunity defense, they have waived that claim. Given that disposition, I see no reason for the majority opinion to have included, altogether gratuitously, the remainder of Part V. As *obiter dictum*, the discussion is without precedential value. Even more troublesome, that discussion addresses an issue that was never briefed before us and never presented in the first instance to the district court. In this circumstance, I have more hesitancy than does my colleague Judge Gibbons in asserting that "the decision to fire Abraham was *as a matter of law* managerial, not legislative." Majority

Typescript Op. at 20 (emphasis added). The parties and the district court, in particular, might have had some useful light to shed on that question. Had this issue been dispositive, the normal procedure would have been to remand it to the district court for resolution.

I believe that it is unsound, both for prudential and jurisprudential reasons, to reach to decide issues which are unnecessary to our disposition and have not been fully developed in the district courts. While a departure from our well-established procedure may be justified in an unusual situation, I see nothing in the record or this case which warrants that action here.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit